IN THE

Supreme Court of the United States

OCTOBER TERM—1973

No. 73-1256

CONNELL CONSTRUCTION COMPANY, INC.,

Petitioner,

vs.

PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 100, etc.,

Respondent.

BRIEF ON BEHALF OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA, BUILDING CHAPTERS OF THE ASSOCIATED GENERAL CONTRACTORS OF TEXAS AND NATIONAL ASSOCIATION OF HOME BUILDERS AS *AMICI CURIAE*

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Introduction

This brief on behalf of Associated General Contractors of America, Associated General Contractors of Texas and the National Association of Home Builders, as *amici curiae*, is filed pursuant to written consent of the parties under Rule 42(2) of this Court. It is in support of the petitioner, Connell Construction Co., Inc.

Interest of *Amici*

The Associated General Contractors of America (AGC herein) represents approximately 9,500 union and non-union general contractors throughout the United States. In addition, AGC has some 75,000 union and non-union associate members who are non-general contractors in

the mechanical, electrical and other specialized fields of construction. AGC's members engage in all forms of construction; highways, roads, bridges, dams, airports, power plants, refineries, public projects at all levels of government, as well as private commercial, institutional, and industrial buildings of all types. It is the largest organization of its kind representing employers in the construction industry. At least 75% of the general construction contracts in the nation are performed by AGC members.

The Building Chapters of the Associated General Contractors of Texas are affiliated with the national AGC. Connell Construction Company, Inc. is a member of that association, the membership of which will be vitally affected by the outcome of this litigation.

The National Association of Home Builders is a national trade association of over 51,000 members with 481 state and local chapters in each of the fifty states, Puerto Rico and the Virgin Islands. It is the largest association of its kind in the nation representing employers in the home building industry.

In the year 1973, total construction expenditures in the United States equalled 135.1 billion dollars. Private residential construction amounted to 57.7 billion and private non residential construction 45 billion dollars. Public utilities alone expended over 15.2 billions. In all, over 10.5% of the Total Gross National Product was attributable to construction. Despite the imposition of wage controls, construction costs rose over 9% in 1973, the largest rise in the post World War II period. During the same year the industry was responsible directly or indirectly for the livelihood of one out of seven persons employed in the United States.

The issues raised by this case will have a tremendous impact upon the industry if such pervasive antitrust product and employer boycott agreements of the kind here involved are allowed to proliferate. The effect upon

construction costs will be staggering, placing greater pressure upon an already dangerously inflated economy. Consequently, the interest of the *amici* is both vital and immediate.[1]

Summary of Argument

The issues presented by this case bring into focus the dichotomy between the nation's antitrust laws and its national labor policy, a subject to which the Court has not addressed its attention since 1965. In 1965 the Court issued its decisions in *United Mine Workers* v. *Pennington*, 381 U. S. 657, and *Local 189 Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U. S. 676, seeking to harmonize the duality of the national interest in the prevention of illegal restraints of trade and the legitimate pursuits of labor in the protection of those it represents.

This case constitutes an attempt by labor to obtain an agreement in restraint of trade completely outside of the collective bargaining framework and from an employer who employs no employees represented by the Union. Indeed it has extracted from that employer, Connell, a general contractor, a coerced agreement whereby Connell has agreed to boycott and refrain from contracting with any employer-subcontractor with whom the Union does not have a collective bargaining contract. For its part, the Union has declared that it will not enter into any arrangement or understanding with any other employer which provides for any more favorable wages or other conditions than those stipulated in the agreement with Connell.

Upon these facts the Fifth Circuit erroneously concluded that a conspiracy or combination in restraint of trade did not exist and refused to consider whether such an agreement is lawful under the National Labor Relations Act (herein NLRA or the Act),[2] even though the

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[1] Source of statistics: *Construction Review*, Vol. 20, No. 3, April 1974, U. S. Department of Commerce.

[2] 49 Stat. 449 as amended by 61 Stat. 136 and 73 Stat. 519, 29 U.S.C. §141 et seq.

resolution of that issue would have aided in its determination of whether or not the Union had violated federal and/or state antitrust laws.

Amici, in support of the petitioner, contend that this agreement represents a conspiracy or combination in restraint of trade between labor and nonlabor forces such as condemned in *Pennington* and that it does not survive the "legitimate union interest" test established by *Jewel Tea* because: 1) it does not arise within the framework of collective bargaining, and 2) it is a secondary "hot cargo" agreement in clear violation of Section 8(e) of the Act.

In essence, the principles of *Carpenters Local 1976* v. *NLRB (Sand Door),* 357 U. S. 93 (1958), and other pre 1959 authorities were not disturbed and construction industry unions gained no greater rights by the enactment of the proviso to Section 8(e) in 1959 than they possessed prior thereto. What was unlawful then is unlawful now. Therefore, the conduct here involved being outside of the protection of the construction industry proviso to Section 8(e), violates the secondary boycott prohibitions of the Act, loses its shield and is exposed to the sanctions of the Sherman Antitrust Act.

In support of the premise that the activity of the Union is not protected by the construction industry proviso to Section 8(e)[3] *Amici* call attention to the total legislative scheme of the NLRA, the primary purpose of which is to encourage free collective bargaining subject to the legitimate rights of the parties and the public. Most importantly, this policy protects the guaranteed Section 7[4] rights of employees in their right to self-organization and designation of representatives *of their own choosing.* Thus, Section 9[5] ofthe Act provides for secret ballot representation elections in the unit affected; Section 8(a)(5)[6]

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[3] 29 U.S.C. §158(e).
[4] 29 U.S.C. §157.
[5] 29 U.S.C. §159.
[6] 29 U.S.C. §158(a)(5).

and Section 8(b)(3)[7] require good faith bargaining with respect to the terms and conditions of employment for that unit; Section 8(b)(7)[8] prohibits picketing that conflicts with these provisions; and Section 8(f)[9], in the absence of any employees, only permits voluntary prehire agreements in the construction industry. Because of Section 8(b)(7)(A)[10] a stranger union cannot interfere in any way with an existing bargaining relationship or force execution of a contract where there are no employees, irrespective of the proviso to Section 8(e). Thus, if this conduct which is clearly secondary is not saved by the proviso, perforce, it violates Sections 8(b)(4)(A), (B)[11] and 8(e). Clearly, the legislative history of the construction industry proviso to Section 8 (e) makes it obvious that a "hot cargo" clause otherwise permitted by the proviso may not be coercively obtained. The National Labor Relations Board (herein the Board) was unanimously of that view until 1964 when, in complete disregard of the legislative history and other controlling precedent, it reversed its original well-reasoned and well-founded opinion.

The factual setting here presented raises an issue of critical importance to the construction industry, its employees, and the public which it serves. To permit the agreement extracted from Connell to stand would run counter to the entire fabric of the NLRA and sanction a conspiracy or combination in restraint of trade. Clearly, the decision below departs from the principles enunciated by this Court in prior antitrust and labor law precedents of long standing. The far reaching issues now before the Court, concerning as they do the largest industry in the nation, are of enormous impact on our economy and urgently require the further definitive teachings of this Court.

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[7] 29 U.S.C. §158(b)(3).
[8] 29 U.S.C. §158(b)(7).
[9] 29 U.S.C. §158(f).
[10] 29 U.S.C. §158(b)(7)(A).
[11] 29 U.S.C. §§158 (b)(4)(A) and (B).

Introduction

The Issues and the Effects of the Decision of the Court of Appeals

The issues herein are of transcendent significance to the many thousands of employers and millions of employees engaged in the construction industry, to builders, owners and the public.

The court below characterized these issues as ". . . extremely important to the delicate balance of labor-management power in the construction industry and national labor policy pertaining thereto." *Connell Constr. Co.* v. *Plumbers & Steamfitters Local 100,* 483 F. 2d 1154, 1157 (5th Cir. 1973).

This Court's decision will determine:

(1) Whether a union, through economic coercion may compel neutral employers in the construction industry, with whom it neither has nor desires a collective bargaining relationship, to agree to boycott and cease contracting with any employer-subcontractor with whom the union does not have a collective bargaining contract.

(2) Whether such a union may impose a broad and unlimited employer boycott in the absence of any basis for a bargaining relationship.

(3) Whether owners, contractors, suppliers, manufacturers and other employers who perform some degree of construction work on and off site may continue to contract to do business with each other on a competitive basis.

(4) Whether an agreement of the kind in issue herein, and the economic coercion to obtain it are lawful under the construction industry proviso to Section 8(e) of the Act.

(5) Whether an agreement, such as that in issue herein, if unlawful under the proviso to Section 8 (e) can nonetheless be a legitimate union interest under federal and/or state antitrust laws.

(6) Whether vast new exceptions have been carved out of our federal antitrust laws.

(7) Whether state antitrust laws are pre-empted by federal labor laws.

(8) Whether federal courts have jurisdiction to render decisions in antitrust cases where such decisions require the interpretation or application of federal labor statutes, or whether the doctrine of primary jurisdiction requires such questions to be decided initially by the National Labor Relations Board.

(9) Whether, by enactment of the construction industry proviso to Section 8(e) the millions of employees who derive their livelihood from construction work have been stripped of the same basic freedoms and rights guaranteed to other employees under the Act.

The majority opinion below stated:

> "We feel quite strongly that the Board should take and consider this issue fully at the next available opportunity. Its resolution will have significant impact on labor relations in the construction industry. Repeated attempts by an administrative body to avoid resolution of a difficult issue may constitute an abuse of discretion. See *Templeton* v. *Dixie Color Printing*, 5 Cir. 1971, 444 F. 2d 1064." (Pet. App. B-46, 47).[12]

[12] All references to Pet. App. refer to the Appendix of Petitioner's Petition for Writ of Certiorari to the U. S. Court of Appeals for the Fifth Circuit.

Despite this mandate from the majority and the ringing dissent of Judge Clark, which fully supports the position of petitioner on both labor law and antitrust issues, the Board's General Counsel, after some twenty months of consideration, could not find reasonable cause to warrant the issuance of complaints in cases involving identical or substantially identical subcontractor agreements. As a matter of fact, he dismissed these cases subsequent to the filing of the petition for a writ of certiorari herein but prior to the granting thereof.[13] Moreover, subsequent to the dismissal of these cases, application to the General Counsel for further consideration in light of this Court's granting of a writ of certiorari has again met with refusal to either reconsider or issue complaints.

As hereinafter shown, and for reasons so ably set forth in the dissent by Judge Clark below, the conclusion is inescapable that the majority decision of the Fifth Circuit renders much of the Act a nullity and distorts its provisions and general scheme beyond recognition. In so doing, the decision of the court below ushers in the basis for a union claim that it is pursuing a "legitimate union interest" when, in fact, it is pursuing an object which is specifically prohibited by the Act and, thus, an interest which is quite illegitimate not only under our labor law but under our federal and Texas antitrust statutes as well.

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[13] *Ponsford Bros.*, N.L.R.B. Case Nos. 28-CC-417 and 28-CE-12; *Hagler Construction Co.*, N.L.R.B. Case No. 10-CC-447; *Howard U. Freeman, Inc.*, N.L.R.B. Case No. 16-CC-477; and *Columbus Building Trades Council*, N.L.R.B. Case No. 9-CC-706 (1-20).

POINT I

The agreement in issue gives rise to a pervasive employer and product boycott in restraint of trade in violation of antitrust laws and in violation of the National Labor Relations Act.

a. The Union's Control of the Market Place.

This Court in *Allen Bradley Co.* v. *Local 3, IBEW*, 325 U. S. 797 (1945), found that a boycott of electrical products in New York City violated the Sherman Act. Here, the Court is confronted with much more than a mere product boycott because the subcontractor agreement in issue includes a product boycott in its all pervasive employer boycott. This is true because of the manner in which contracts are let in the construction industry. Historically, labor in the construction industry has not been covered by a separate contract; rather it has been included as a part of the entire contract. The cost of the mechanical contract is generally a very substantial percentage of the total cost of the entire project and, depending upon the type of project, frequently amounts to between 40% and 60% of total construction costs. On larger projects, such as power plants and refineries, the cost of the mechanical equipment, products and supplies covered by the mechanical contract can run into many millions of dollars.

Accordingly, subcontractors, specialty contractors, manufacturers, suppliers and others sell products, services and labor by a single contract to a general contractor who generally has responsibility for the entire job. Thus, if a given subcontractor, lacking the required contract with the union, is excluded because he is not part of the preferred class, both his product (prefabricated or otherwise) as well as his labor is excluded from the market place.[14] The

[14] Any inclusion of a product boycott in this all pervasive employer boycott clearly runs counter to the view of Justice Stewart

(Footnote continued on following page)

subcontractor agreement in issue locks in the preferred class of contractors and locks out everyone else, thereby granting the union building trades and the employers under contract to them a monopolistic stranglehold on the market. As this Court observed in *Allen Bradley*,

> ". . . [I]f business groups, by combining with labor unions, can fix prices and divide up markets, it was little more than a futile gesture for Congress to prohibit price fixing by business groups themselves." 325 U. S. 810.

Moreover, as so well put by Judge Clark in his dissent below,

> "Since no general contractor could withstand the pressure of having his entire work picketed, the meaning to everyone in the plumbing trades is clear—get in Plumbers Local 100 or get out of business." (Pet. App. B-50).

Undoubtedly, therefore, unless struck down by this Court, the type of employer boycott resulting from such unrestrained union activity will sweep through the construction industry like wild fire, consuming those employers and their employees who dare resist.

From the standpoint of the employer not in the preferred class, if the union refuses, for any reason, to enter

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(Footnote continued from preceding page)

in his dissent in *National Woodwork Mfrs. Ass'n* v. *NLRB*, 387 U. S. 612 (1967), wherein he said:

> "The courts and the National Labor Relations Board fully recognized that Congress had intended to ban product boycotts along with other forms of the secondary boycott, and that it had not distinguished between 'good' and 'bad' secondary boycotts. In a 1949 decision involving Section 8(b)(4), the Board stated that 'Congress considered the "product boycott" one of the precise evils which that provision was designed to curb.' The courts agreed." 387 U. S. at 658 (footnote omitted).

into a collective bargaining agreement with him, he and his employees are foreclosed from the market place. There is no way that an employer or his employees can force a union to sign a collective bargaining agreement. The employer and his employees are, therefore, at the mercy or whim of the union. The union is in the position of complete dominance and can dictate which employers may enter the market place and whether they remain.

Having this awesome power, the union is likewise in the position of dictating how the employer may conduct his business in other respects, either within or without the framework of a collective bargaining agreement. As so aptly observed in *Labor Unions and Public Policy*:[15]

> "Unions already do many things which directly 'restrain trade' in the product market and which businessmen cannot do—merely because they are unions and exempt from the anti-trust laws. They may be, and have been, used in effect as 'agents' of employers to enforce collusive agreements with respect to product prices. And in cases where producers for some reason are unable to form or maintain a monopoly agreement, unions have a special incentive to exercise monopoly power in the product market for their own ends. Indirectly unions may already have more influence on raising costs and thus prices than do businessmen. . . . [T]he public will awake one day to find that a degree of economic control, which it would never have tolerated in the hands of businessmen, has already passed into the hands of someone else."

If the conduct herein is permitted, that day has come. *Amici* herein represent thousands of contractors and home builders who cannot provide sorely needed facilities at fair prices for the old, the needy, the underprivileged, and

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[15] Chamberlin, Bradley, Reilly & Pound, *Labor Unions and Public Policy*, 17, 18 (1958).

the vastly expanding needs of our economy, if such impediments to free and fair competition are allowed to flourish. It is clear that once the union is elevated to this position of power, even the desires of the employees in the preferred unit can be meaningless and rights under Section 7 of the NLRA completely destroyed. A vote in such a unit to decertify the union is tantamount to electing unemployment.

As Judge Clark concluded in his dissent below:

> "Therefore, I would hold that where a union bypasses the congressionally sanctioned methods of organizing the employer whose employees it seeks to unite (here, the individual subcontractors) and illegally brings pressure on a neutral, secondary source of work for all such employers within an area (Connell) to force that unrelated economic entity to execute a contract which requires that all directly involved subcontractors bring their work forces into the membership of this local or starve for lack of work, then that union has passed beyond the scope of antitrust immunity." (Pet. App. B-57) (footnote omitted)

b. The Conspiracy and Combination to Restrain Trade.

The court of appeals viewed the facts of this case as not violating the "conspiracy test" enunciated by this Court in such cases as *Allen Bradley,* and *Penington,* or the "legitimate union interest" test explicated in *Jewel Tea.* In both instances the majority of the Court failed to perceive the massive nature of this employer boycott bottomed on an agreement in restraint of trade.

The factual record below clearly establishes that the Union had previously entered into a master area agreement with the area multi-employer bargaining unit of mechanical and plumbing contractors whereby the Union agreed that it would ". . . not grant or enter into any arrangement or understanding with any other employer,

which provides for any wages less than stipulated in this Agreement . . ." (A. 118)[16] The record shows that the Union would not permit any employer to sign a contract other than the Master Area Agreement (A. 73-74). That agreement surely does not comport with the standard pronounced in *Pennington,* where the Court said:

> "We think it beyond question that a union may conclude a wage agreement with the multi-employer bargaining unit without violating the anti-trust laws and that it may as a matter of its own policy, *and not by agreement with all or part of the employers of that unit,* seek the same wages from other employers." 381 U. S. 664 (emphasis added).

Perforce, if the union goes beyond that limitation and specifically agrees in writing that no other employer will be given better rates, it is a clear antitrust violation. That is precisely the case here.

By contrast and drawing from the teachings of *Pennington,* the Board considered the legality of such "most favored nations" clauses in *Dolly Madison Industries, Inc.,* 182 N.L.R.B. 1037 (1970). In that case the clause provided in essence that should the union at any time enter into an agreement with an employer in the same industry which provided for more favorable terms and conditions, the signatory employer would be privileged to adopt such advantageous terms and conditions as its own. Holding such a provision to be lawful and comparing it to *Pennington,* the Board stated:

> ". . . [A]s pointed out by the Supreme Court, the union by reason of the clause there involved abandoned the right to which it and those of its members who were employed by other employers were

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[16] Article XIX, Master Collective Bargaining Agreement. NOTE, References to A. refer to the Appendix filed herein.

> entitled under the Act to bargain collectively with such other employers concerning substantial terms and conditions of employment—and this to the detriment of itself and other members, thereby frustrating the purposes of the Act." 182 N.L.R.B. 1038.

Yet, the majority decision below would sanction conduct which permits the Union to extract an agreement from Connell which would broaden that conspiracy or combination (between the Union and the multi-employer unit of plumbing contractors) by requiring Connell to impose the union contract upon its subcontractors or cease doing business with them. Moreover, the majority decision sanctions such conduct by way of economic coercion even though Connell does not have employees who are represented by the Union. In this case, therefore, apart from the illegal nature of the "most favored nations" clause sought, there is absent that critical factor without which such demand is improper, namely, the conventional bargaining relationship.

Consequently, the evil so well enunciated by this Court in *Pennington* and by the Board in *Dolly Madison* is apparent. Connell has now become through coercion an unwilling party to the conspiracy or combination between the Union and members of the favored employer group. The conspiracy or combination is a very real one which has the effect of preventing employers outside of the preferred class and their employees from doing business with Connell and from determining their own destiny under our federal labor law policy. Manifestly, the agreement would virtually eliminate real competition in the construction industry by removing as competitive factors critical elements of a contractor's costs. Indeed, the conspiracy here is more tightly constricted than in normal antitrust cases. The agreement imposed upon Connell would prevent it from doing business with an employer even on the same terms as members of the association, if (a) *his employees*

were either unrepresented, or (b) *were represented by another union and already covered by a contract,* or (c) *the Union refused, for whatever reason it chose, to permit such employer a contract.*

Connell must deal only with an employer under contract to the Union and on no more favorable terms. And so the conspiratorial circle is closed and the illegal combination advanced as more and more employers seeking to do business with Connell (or other general contractor parties to the agreement) must execute a contract with the Union regardless of whether it is in their best interest or that of their employees.

The restraint of trade herein is accomplished by the Union's application of economic coercion with resultant "domino effect". The testimony of Union Business Agent Patterson indisputably shows; (1) that the Union will only permit a contractor to sign the master area agreement (A. 73-74), and (2) that the Union has picketed contractors throughout the area for the past three years to obtain this type of agreement (A. 84). Thus, the Union, using economic coercion and the master area agreement as the basic contractual device, successively knocks over recalcitrant contractors, thereby ever broadening the illegal combination and contract in restraint of trade, with Connell simply being one of the dominoes.

The conspiracy test of *Allen Bradley* and *Pennington* have, therefore, been met and, as we shall seek to demonstrate in the section of this brief devoted to the labor law aspects of this case, had the Court majority not erroneously refused to consider the legality of the union's actions under the NLRA, it would have reached the conclusion that such conduct was unlawful under the Act and thus not legitimate under *Jewel Tea* standards.

As this Court has stated, the Sherman Act is "a comprehensive charter of economic liberty", *Northern Pacific Ry.* v. *United States,* 356 U.S. 1, 4 (1958); "The heart of our national economic policy long has been faith in the

value of competition", *Standard Oil* v. *FTC,* 340 U.S. 231, 248 (1951); and Courts should not impute to Congress an intent to carve out "vast exceptions" to the Sherman Act unless the Congressional purpose is plain, *Schwegmann Bros.* v. *Calvert Distillers Corporation,* 341 U.S. 384, 395 (1950).

Moreover, of controlling significance is the fact that this case does not involve a labor dispute between Connell and its employees.

As this Court declared in *Columbia River Packers Ass'n* v. *Hinton,* 315 U. S. 143 (1942), an antitrust case having labor law overtones:

> "We recognize that by the terms of the statute there may be a 'labor dispute' where the disputants do not stand in the proximate relation of employer and employee. But the statutory classification, however broad, of parties and circumstances to which a 'labor dispute' may relate does not expand the application of the Act to include controversies upon which the employer-employee relationship has no bearing." 315 U. S. at 146, 147 (footnote omitted).

Accordingly, for the foregoing reasons we submit the Union herein has violated the antitrust provisions of both federal and state law.

POINT II

The agreement in issue is of such an illegal nature as to preclude the determination that it represents a legitimate union interest for antitrust purposes.

The court majority below, having failed to find a conspiracy or combination in restraint of trade, turned its attention to whether the Union had a legitimate interest in

bringing pressure upon Connell to enter into the agreement in issue. However, to fully resolve that question, as the majority found, it is first necessary to inquire into the meaning of Sections 8(b)(4)(A), (B) and 8(e) of the NLRA as amended. Regrettably, concluding that the initial decision in such matters is within the exclusive domain of the Board, the majority discussed but failed to pass upon these questions. Having done so, it abandoned that which was its legitimate concern, namely to apply the *Jewel Tea* test to the union's conduct. Only through such an inquiry and determination can light be shed upon whether the union is pursuing a legitimate interest. Such an issue cannot be ignored. Indeed, there can be no finding that the restrictive agreement does not violate the federal antitrust laws without first finding that the forcing of such pervasive employer boycotts is a legitimate union objective, that is, conduct protected by the NLRA, or at least not unlawful under its provisions.[17]

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[17] As Judge Clark commented in his dissent below:

> "Not all union misconduct constituting an unfair labor practice should entail a loss of union antitrust exemption; only the conduct which violates the congressionally-protected commercial rights of neutral parties would normally fall without the exemption. It is neither necessary nor appropriate for this dissent to attempt a complete catalogue of that labor law illegal conduct which falls without the exemption. Suffice it to say that since Section 8(e) is designed and intended to protect neutral parties from concerted boycotts required by union activity, a violation of that provision under circumstances similar to those here will place a union beyond the scope of the exemption." (Pet. App. B-56, n. 10).

Representation Rights Under the National Labor Relations Act

The *sine qua non* to lawful collective bargaining between an employer and a labor organization is the presence of a direct employer-employee relationship. Collective bargaining simply cannot take place in the absence of such a relationship. Moreover, recognition, with all the rights that flow therefrom, both to employers, labor organizations and employees, must conform to procedures and requirements set forth in the Act. In this regard, there are only three basic ways that an employer may lawfully recognize and deal with a labor organization under the Act:

(1) Following certification pursuant to a Board conducted election under Section 9 of the Act.

(2) By volunutary recognition upon a showing of majority status by the union and without need of Board certification;

(3) Pursuant to Section 8(f), the single exception in the Act allowing voluntary recognition *in the absence of employees*: (This exception applies only to the construction industry.)

When Congress, in 1959, enacted Section 8(f), it was extremely careful to note that a prehire agreement could only be obtained through *voluntary* means and without picketing.

As the Ninth Circuit said in *Construction, Production and Maintenance Laborers Local 1383* v. *NLRB,* 323 F. 2d 422 (9th Cir. 1963):

> "Section 8(f) makes certain prehire collective bargaining agreements, otherwise unlawful under the Act, permissible in the construction industry; but the legislative history contains statements specifically disclaiming an intention thereby to authorize

> strikes or picketing to coerce such prehire agreements." 323 F. 2d at 425.

The provision also states that such an agreement ". . . shall not be a bar to a petition filed pursuant to Section 9(c) or 9(e)".[18] Accordingly, once employees are hired by the employer, if they are dissatisfied with their union representation, not having been granted a prior opportunity to select their bargaining representative, despite the existence of a lawful collective bargaining agreement, they may file a decertification petition.

Therefore, as this brief will show, these procedures and many other provisions throughout the Act effectively protect employee rights guaranteed under Section 7, and to this extent the rights of construction workers are the equal of others. They are not and never were intended to be subordinate.

Having established the predicate for bargaining, a direct employer-employee relationship brought about through the use of one of the procedures outlined above, the parties are now free to enjoy the full range of rights provided in the Act. Certain rights and privileges under the Act inure to the benefit of employees, employers, or labor organizations, but in each case, they protect neutrals and the public at large, as a basic cornerstone of our national labor policy. That policy as expressed in the Act is:

> "Section 1. (b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in

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[18] 29 U.S.C. §158(f).

> acts or practices which jeopardize the public health, safety, or interest.
>
> "It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."[19]

It is against this background that Connell's facts must be considered.

Initially, it must be emphasized that Connell had contracts with various trade unions representing all of its craft employees. It had no employer-employee relationship with employees who do plumbing work or the type of unit work represented by Local Union 100. More particularly, Local 100, itself, disclaimed any intention of seeking a relationship in which it would either furnish employees to Connell or allow Connell to obtain employees. In short, Local 100 did not want a Section 8(f) prehire contract. Obviously, as already shown, such an agreement could not lawfully be obtained by coercion. Thus, Local 100 characterized its conduct as expressing the sole desire to force Connell to agree that it would only deal with employers with whom Local 100 had contracts. Accordingly, no direct employer-employee relationship exists, nor was there ever the intention on the part of either party to establish any such relationship.

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[19] 29 U.S.C. §141(b).

Patently, because of the lack of a direct employer-employee relationship, any picketing engaged in by Local 100 under these circumstances is clearly unlawful and should be struck down. Not so, says Local 100, because the construction industry proviso to Section 8(e) of the Act grants this bargaining right to Local 100 irrespective of the lack of any employer-employee relationship. This very contention was erroneously adopted by the district court below but not dealt with by the majority opinion. Consequently, it is a critical issue that must be examined by this Court.

Amici know of no other cases in which the Board or any court has considered this issue and specifically ruled that an employer can be forced by a union to enter into a "hot cargo" clause in the total absence of any basis for a collective bargaining relationship. Indeed, such a holding would completely eviscerate and render meaningless many if not all of the provisions of the Act designed to protect the rights of employees guaranteed by Section 7 and the numerous duties and obligations of all parties that flow therefrom.

In *National Woodwork,* discussing whether or not certain work preservation clauses violated the secondary boycott provisions of the Act, this Court stated:

> ". . . The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees." 386 U. S. at 645.

Connell has no employees represented by this labor organization and the union specifically disavows recognition. The union's objectives must, therefore, be tactically directed elsewhere. In fact, the court below found that:

> ". . . The central reason that the union wants the agreement sought in this case is that it will be helpful in organizing other subcontractors." (Pet. App. B-29)

Thus, the "vis-a-vis" relationship is totally absent and the primary purpose of the Act, namely, to promote free collective bargaining *pursuant to statutorily required procedures* is defeated. A new organizational and recognitional technique is born. Fortunately, the fallacy of this method has previously been exposed to judicial scrutiny and struck down.

In *Dallas Bldg. and Constr. Trades Council* v. *NLRB (Dallas Building Trades),* 396 F. 2d 677 (D. C. Cir. 1968), the Court of Appeals for the District of Columbia found that Section 8(b)(7)(A) prohibits the picketing of an employer for the purpose of compelling it to execute a subcontracting agreement ". . . where another union is already lawfully recognized and when representation issues are in a state of statutory repose." 396 F. 2d at 678.

There the Court stated:

> "'[E]mployers are entitled to the protection of Section 8(b)(7)(A) against actions which tend to erode or even destroy their right to operate unimpeded by outsiders' threats and picketing, under the collective bargaining terms lawfully negotiated with their employees' representatives.'" 396 F. 2d at 681.

In *Dallas Building Trades,* the Court quoted from its earlier decision in *Centralia Bldg. and Constr. Trades Council* v. *NLRB,* 363 F. 2d 699 (D. C. Cir. 1966), in which it upheld the Board's determination that:

> ". . . [P]icketing by an unrecognized labor organization to obtain an agreement from the employer obligating him to pay his employees union wages and fringe benefits was recognitional and therefore in violation of Section 8(b)(7)(C)." 396 F. 2d at 683.

The Court further observed:

> ". . . *Centralia,* however, does not mean that Section 8(b)(7) is violated only when the picketing

> union seeks to preempt the entire scope of interest of a recognized representative of the employees. The thrust of *Centralia* is that, so long as the union seeks a contract dealing with a subject relating to the conditions of employment of the general contractors' *own employees,* the picketing is recognitional within Section 8(b) (7)." 396 F. 2d at 683 (emphasis added).

Thereafter, in *Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council,* 165 N.L.R.B. 538 (1967), enforced, 415 F. 2d 656 (9th Cir. 1969), the Board, in considering another subcontractor agreement case where the general contractor was picketed to compel his execution of such agreement, found that the agreement contained provisions restricting the contracting and subcontracting of work by the general contractor who was already covered by existing collective bargaining agreements with the various unions. The Board said:

> ". . . For reasons given in *Dallas Building and Construction,* we find that the picketing to secure such an agreement was for an object of recognition and bargaining within the meaning of Section 8(b) (7). It must also be found, as the Trial Examiner did, that this picketing was conducted by a labor organization which was not certified to represent any of Chamber's employees, that it occurred at a time when Chambers was lawfully recognizing other unions, and that a question concerning representation could not be raised as to such employees under Section 9(c) of the Act." 165 N.L.R.B. 538 (footnote omitted).

In *Lane-Coos,* the union argued that any contracts that Chambers did have were prehire agreements which did not preclude a question concerning representation. The Board in response stated:

> ". . . The record plainly shows, for example, that Chambers' laborers and carpenters were already

> members of the Laborers and Carpenters, respectively, when the contracts with these unions were executed. Accordingly, we conclude that the Respondents' picketing was proscribed by Section 8(b)(7)(A) of the Act." 165 N.L.R.B. 538.

This Board opinion clearly demonstrates that the basic rights of the employees within the general contractor's unit were fully protected and under no circumstances could an intrusion be made into that collective bargaining relationship. Again, in *Dallas Building Trades, supra,* when the contention was advanced that areawide agreements with building trades unions are a recognized pattern of bargaining and, therefore, should be considered appropriate in such a setting, the court responded:

> ". . . Even if areawide subcontracting agreements have been adopted by multi-member bargaining units, the Council has not shown that those agreements *were obtained by picketing* or that the labor organizations with which they were negotiated were not recognized within the meaning of Section 9." 396 F. 2d at 682. (footnote omitted) (emphasis added)

Obviously, here again, the District of Columbia Circuit was concerned with agreements which are obtained by *coercion* rather than by lawful means of recognition under the Act. Moreover, the court recognized that such conditions ". . . [W]ould have a significant impact upon some of the general contractors' employees." 396 F. 2d at 680.

It pointedly observed:

> ". . . Whether or not the employees would be benefitted by the proposal of the outsider union is irrelevant if that proposal would bind the employer with respect to a matter about which the recognized union may bargain as exclusive representative of the employees." 396 F. 2d at 680.

> "The Association has already bargained with several of the local craft unions for the omission of subcontractor clauses from its agreement. Its members should be shielded from coercion on the second front by an organization with which they have no obligation to bargain." 396 F. 2d at 681.

The Building Trades Council argued that the collective bargaining contracts with the various local unions were prehire agreements and that therefore the council could properly seek recognition because under Section 8(f) such contracts "shall not be a bar to a petition filed pursuant to Section 9(c)." The court responded:

> "[T]he legislative history of Section 8(f) reveals that Congress envisioned its pre-hire provisions as applying only to the situation where the parties were attempting to establish a bargaining relationship for the first time." 396 F. 2d at 680, n. 4.

Thus, the court would not allow the Council, using Section 8(f) or any other guise, to disturb the established and continuing bargaining relationship between the employers and the local unions representing their employees. In short, after an initial 8(f) contract where employees have been hired pursuant thereto—any subsequent contract enjoys the protections of the Act that flow to a normal relationship based upon majority status.

Lastly, the Building Trades Department AFL-CIO, as *Amicus,* advanced an argument that a Section 8(b)(7)(A) violation cannot occur unless the effort is to displace completely the recognized union. In short, it argued that a stranger union may negotiate on something less than a full contract or for certain limited issues. The court met this argument squarely by saying:

> ". . . This contention goes beyond that of the Council, and does not appear to be compatible with the clear purpose of Section 8(b)(7) *to prevent any infringement of the recognized union's representa-*

tive status." (Emphasis added.) 396 F. 2d at 680, n. 5.

Thus, if a stranger union is not permitted to disturb the existing collective bargaining relationship, its activity in seeking to extract a subcontractor clause is secondary as to that employer.

Any conduct that involves the construction industry proviso to Section 8(e) must be secondary in nature, otherwise the proviso is not involved. *Accordingly, if a union attempts to draw support from that proviso to sustain the legality of its conduct, it concedes that failing same its conduct must be unlawful secondary activity in violation of Sections 8(b)(4)(A), (B) and 8(e) of the Act.*[20]

Section 8(b)(7)(A) protects the general contractor and its employees from eroding intrusions upon their relationship. The proviso to Section 8(e), on the other hand, *allows the general contractor's employees and them alone,* because of their vis-a-vis bargaining relationship with their employer, freedom to negotiate a voluntary subcontractor clause or, depending upon their scale of values, to seek other benefits in lieu thereof. *Dallas Building Trades,* 396 F. 2d at 681. See also, dissent of Justice Douglas in *Sand Door,* 357 U. S. at 112. Stated another way, Section 8(b)(7)(A) protects the existing relationship and the proviso to Section 8(e) allows that relationship full play with regard to whether or not such a clause may be negotiated.

Clearly, the Union herein does not, and cannot, have a primary relationship with Connell, for Connell does not employ its members. Therefore, the Union's relationship to Connell is and must remain secondary. Since its activity is directed against Connell, its employees and their mutual bargaining relationship, such activity cannot escape such result.

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[20] This Court has previously held that the same conduct may violate more than one section of the Act. *NLRB* v. *Local 825 Operating Engineers, (Burns & Roe),* 400 U. S. 297 (1971).

POINT III

To hold that the activity of the union herein is protected by the construction industry proviso to Section 8(e) would distort the Act and lead to bizarre consequences in its enforcement.

The distortions that would arise from a finding that a vis-a-vis relationship is not necessary to the legality of clauses of the kind here involved would leave the Act in a chaotic state and defeat its purposes. In this factual setting, where Connell was not previously foreclosed from doing business with any subcontractor, such a construction of the Act would usher in a parade of horribles. Those that come readily to mind include the following:

Let us assume Employer A, a plumbing subcontractor, has already entered into a lawful collective bargaining contract with Union B, a union other than Local 100. How then may this employer sign a contract with respondent Local 100 without committing an unfair labor practice? As an employer outside the preferred class of contractors, the emloyer would clearly be in violation of the rights of the union he has previously recognized and the employees it represents.

If the employees of Employer A have rejected Local 100 in a Board conducted certification election, how may the employer sign a contract with Local 100 against the expressed and continuing desires of its employees? Thus, Employer A is again precluded from doing business with Connell.

Let us assume further that the employees of Employer A had not heretofore been represented by a union and their employer entered into a Section 8(f) prehire agreement with Local 100. Assume further the employees became extremely dissatisfied with Local 100, petitioned the Board for an election and decertified Local 100. Once again, how could their employer by not being in the favored class and under contract with Local 100 do busi-

ness with Connell? In either of these illustrations both the employees and their employer are forced from the market place.

Assuming that none of the foregoing situations was an impediment, if Employer A decided to enter into a Section 8(f) prehire agreement with Local 100, but Local 100, for whatever reason, refused to permit Employer A to sign the multi-employer association agreement or an individual agreement, he could not work for Connell. Thus, that employer and his employees are foreclosed from doing business with Connell and other general contractors similarly situated and, quite incongruously, even if the employer and his employees sincerely wanted a relationship by collective bargaining agreement with Local 100.

Because of the illicit "most favored nations clause" present in the contract between Local 100 and its favored group of employers, it is not free to engage in good faith collective bargaining because it is bound to offer new employers no better contract than negotiated under the master multi-employer agreement. This clearly cuts against the public interest. Moreover, it would constitute an unfair labor practice and a refusal by Local 100 to bargain in good faith. Indeed, it makes the "take it or leave it" or so-called "Bulwarism"[21] approach to bargaining innocuous by comparison. At least "Bulwarism" was predicated upon a collective bargaining relationship in which the parties had previously negotiated their own agreement and the only issue was the "take it or leave it" stance of one of the parties.

What is the result if rival unions, possibly emerging unions dedicated to the representation of minorities, ethnic groups and females, likewise exerted economic coercion to compel execution of similarly restrictive agreements? If a basis for collective bargaining is not needed,

[21] *NLRB* v. *General Electric Company*, 418 F. 2d 736 (2nd Cir. 1969), cert. denied, 397 U. S. 965 (1970), rehearing denied, 397 U. S. 1059 (1970).

what is to prevent an employer from being successively picketed by rival unions for such agreements? Does the employer capitulate to the demands of each? What does an employer do in the case of a small job where no union subcontractor submits a bid or the only bid or bids are excessively high? If the employer is forced to sign more than one such agreement, what are his legal defenses, if any, when sued for specific performance or damages?

Looking further into the havoc that would be caused by a finding that a vis-a-vis relationship is not necessary to the legality of agreements such as in issue here, *amici* pose these questions:

On what basis would it be timely for employees of another union, such as a District 50 or an independent union, to seek recognition to obtain a similar contract? How would the Board's normal contract bar principles apply in such circumstances, if they would be applicable at all? If another union were to seek recognition in the same way as Local 100, could it picket indefinitely without the need for filing a petition? If a petition were to be filed, could or would the Board entertain it and if so on what basis, the 30% showing of interest of the employees of a different employer than Connell? How many unions could picket the general contractor and for how long for this type of agreement? Moreover, if the employees of Connell decide that they affirmatively *do not want* such a provision (perhaps because Connell is losing work opportunities due to the high cost of mechanical bids from the preferred employers), are Connell's employees and *their Union* engaging in a secondary boycott in trying to bring about a cessation of business between Connell and the preferred employers under contract with Local 100? If this were so, doesn't it oust Connell's employees from a permissible subject of collective bargaining in a rather odd and unforseen way?

Is Connell in these circumstances exposed to a suit by Local 100 under Section 301 of the Act by way of specific performance or damages? If specific performance

were gr nted to Local 100, could it be said that the employees of Connell in the union with which it has a collective bargaining agreement are not also entitled to their own bargain and to specific performance or enforcement of their contract. Obviously, both theories are on a collision course and at odds with each other.

Could it be alleged that picketing for a subcontractor agreement by a second union gives rise to a jurisdictional dispute with Local 100 under Section 8(b)(4)(D) of the Act? If the first agreement were valid, then it certainly would seem true that subsequent picketing would violate Section 8(b)(4)(D). However, if such circumstances give rise to a jurisdictional dispute, why is it not so in the first instance where employees of other employers, whether organized or not, are in possession of and performing such work? If the general contractor succumbed to the demands of the second union seeking a subcontractor agreement, could the union party to the first agreement picket? And, would such picketing be immune to Section 8(b)(4)(D) on the theory that the employer has violated his agreement? Is not the employer on a merry-go-round from which there is no escape?

Consider also the incongruity of this situation. If Connell were to agree with Union A, i.e. a carpenter's union representing its own employees, that it would only subcontract to an employer having an agreement with the member unions of the local Building Trades Council, such an agreement under the clear principles of *Sand Door* and the legislative history of Section 8(e) could not be enforced by a strike. If Connell were to breach the agreement the only recourse available to Union A would be to institute a suit for civil damages or perhaps specific performance. Yet, under the decision below, Local 100 could strike to obtain such a clause for its own benefit. In effect, Local 100 would have the enforcement powers denied to Union A.

This entire range of new problems would not exist except for the obvious evisceration of fundamental concepts in the Act and the avoidance of sound Board and judicial precedents of long standing. Patently, a new law is being written and not by Congress. If a common situs picketing bill has perennially been rejected by Congress.[22] and it has, if *NLRB* v. *Denver Bldg. and Constr. Trades Council* (*Denver Building Trades*), 341 U.S. 675 (1951), still has vitality (and the legislative history of 1959 is extremely clear that it has),[23] and if our national labor policy as most recently expressed in *Boys' Market* v. *Retail Clerks Union, Local 770,* 398 U. S. 235 (1970), favors procedures for the orderly resolution of disputes, should a strange new concept be adopted that would effectively sweep away all of the law developed to date?

In a factual setting like *Denver Building Trades* the electrical union there need only change its picket sign to indicate that it is seeking the execution of a subcontractor agreement from the general contractor and that conduct would be lawful. Thus, the teachings of this Court in *Denver Building Trades* and the long line of cases adhering thereto would become meaningless. If this were the case, then unions by coercive means could compel execution of these type agreements of unlimited duration which would apply to all contractors on all future jobs. Hence, there would be no requirement that labor disputes must exist or that any offending subcontractor be present on the job site. Obviously, such a result obviates *Moore Drydock,*[24] *General Electric*[25] and other sound precedents.

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[22] See for example H.R. 9070, H.R. 9089, H.R. 9373, and S. 2643 (86th Congress, 1960); H.R. 10027 (89th Congress 1965); H.R. 100 (90th and 91st Congress, 1967, 1969); H.R. 7438 (92nd Congress); and H.R. 4726 (93rd Congress, 1973).

[23] II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 1433.

[24] *Sailors Union of the Pacific,* 92 N.L.R.B. 547 (1950).

[25] *Local 761 International Union of Electrical Radio and Machine Workers, AFL-CIO* v. *NLRB,* 366 U. S. 667 (1961).

If the union is free to make such a "collective bargaining" demand and by economic coercion bring an entire job to a standstill, what are the rights of the contractor? Does Section 8(b)(3) of the Act, which imposes the duty to bargain in good faith upon a union apply in the absence of recognition of the union? (It should be recalled Local 100 disclaims any interest in recognition.) How then may Local 100 be compelled to bargain in good faith if the section of the Act imposing that obligation upon a union has no application? While the union is free to make such a demand as in the instant situation to the point of exerting economic coercion, what recourse does an employer have to apply leverage on the union? He has no employees that may go on strike if he bargains to impasse nor does he have employees he may lawfully lock out or replace. He is completely without any economic leverage, which can hardly be considered the type of collective bargaining relationship contemplated by the Act. As Justice Brennan said in *NLRB* v. *Insurance Agents International Union, AFL-CIO,* 361 U. S. 477, 489 ". . . [T]he presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized."

What are Connell's rights to insist, if Connell acts as a government contractor, that the subcontractor agreement contain provisions that the union will agree to furnish members of minority and ethnic groups or females from its hiring hall in numbers required by Connell in order that the contractor on Connell's job, and thus Connell, can remain in compliance or come into compliance with federal and state statutes and regulations which provide for equal employment opportunity on their job sites? How does Connell or any subcontractor with whom Connell would do business guarantee that the protections set forth in *Mansion House*[26] and *Bekins*[27] are available?

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[26] *NLRB* v. *Mansion House Center Management Corp.,* 473 F. 2d 471 (8th Cir. 1973).

[27] *Bekins Moving & Storage,* 21 N.L.R.B. No. 7 (1974).

Consider also that if this method of obtaining a subcontractor agreement is upheld, there is absolutely no limitation to its breadth or scope. An International union in the building trades can strike a major general contractor at any location in the United States and force that particular employer to deal only with contractors under a contractual relationship with that particular International union. In one fell swoop any International union in the AFL-CIO or the Teamsters could force a standard contract nationwide, bringing the cycle full circle and back to that which prompted Section 8(e) in the first place, namely, sweeping and offending "hot cargo" relationships declared inimical to the public interest.

Certain references in the Act should also be noted. For example, Section 201 of the Act uses phraseology throughout that refers to "collective bargaining between employers and the representatives of their employees."[28] Section 203(c) directs the Director of the Mediation Service to pursue various means to settle disputes "including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot."[29] Obviously, in a setting such as the one here involved with no employees being represented by Local 100, in the event of a termination of the agreement and an effort at bargaining, pursuit of such an act by the Mediation Service is literally impossible.

We have attempted by these examples to point out the complete incompatibility of the majority's decision with the basic purposes of the NLRA. While the construction industry enjoys a certain "favored" status under the Act, we emphasize again that the vital element absent here is that the agreement does not address itself to the labor relations of the "employer *vis-a-vis* his own employees." *National Woodwork Mfrs. Ass'n* v. *NLRB.*

[28] 29 U.S.C. §171(a).

[29] 29 U.S.C. §173(c).

Failing this, it is clear secondary boycott activity. Thus, the union's interest is not legitimate and cannot avoid antitrust strictures prohibiting such a massive restraint of trade.

The legislative history of the Act, as evidenced by the oft quoted but badly construed words of then Senator Kennedy, Congressman Barden, and others in the development of Section 8(e) provisions, unalterably support that conclusion and admit of no other.

POINT IV

This Court's prior decisions and the clear legislative history of the 1959 amendments prohibit coercion to compel execution of hot cargo contracts in the construction industry.

A full understanding of Section 8(e) requires reconsideration of the principles articulated by Justice Frankfurther in this Court's *Sand Door* decision. In that case, Justice Frankfurter, speaking for the Court, said that a union is free to approach an employer to persuade him to sign a "hot cargo" clause *voluntarily,* and thus, to engage in a boycott, so long as the union refrains from coercion. Therefore, while recognizing that prior to the enactment of Section 8(e), in 1959, a labor organization and an employer could voluntarily enter into a "hot cargo" agreement, this Court nevertheless held that such a contract could not be enforced by coercive means specifically prohibited in Section 8(b)(4)(B) formerly (A) of the NLRA.[30]

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[30] Significantly, the dissent of Justice Douglas in *Sand Door,* which was joined by Chief Justice Warren and Justice Black and which would have permitted enforcement of such a provision by coercion, was based upon the reasoning that if the clause was the

(Footnote continued on following page)

It was also clear and undisputed law prior to the 1959 Section 8(e) amendment that a union could not strike to obtain such a clause without violating the secondary boycott provisions of the Act. *Texas Industries Inc.,* 112 N.L.R.B. 923, enforced, 234 F. 2d 296 (5th Cir. 1956); *Bangor Bldg. Trades Council,* 123 N.L.R.B. 484, enforced, 278 F. 2d 287 (1st Cir. 1960); ***Bricklayers, Masons and Plasterers, Int'l Union*** *(Selby-Battersby & Co.),* 125 N.L.R.B. 1179 (1959).

Initially, the congressional purpose of the 1959 amendments was to outlaw all "hot cargo" agreements in all industries even if voluntary in nature. Thus, Section 8 (e) makes all such contracts heretofore or hereafter entered into unenforceable and void. However, two industries received more favorable treatment, the apparel and clothing industry and the construction industry.

Authorities are in accord that the apparel and clothing industry proviso to Section 8(e) is more sweeping, exempting such industry from both Section 8(e) and Section 8(b)(4) as well. By its terms the apparel and clothing industry proviso allows Section 8(b)(4) conduct, i.e. picketing, inducement and other forms of economic co-

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(Footnote continued from preceding page)

product of *voluntary collective bargaining,* it should be enforceable just as any other provision of a collective bargaining agreement. Said Justice Douglas:

> "That provision was bargained for like every other clause in the collective agreement. It was agreed to by the employer. How important it may have been to the parties—how high or low in their scale of values—we do not know. But on these records *it was the product of bargaining, not of coercion."* 357 U. S. at 112. (emphasis added)

And later he added:

> "Certain it is that where he *voluntarily agrees* to the 'unfair' goods clause he is not forced or coerced in the statutory sense." 357 U. S. at 113, 114. (emphasis added).

ercion to obtain and enforce an agreement otherwise prohibited by Section 8(e). But as the construction industry proviso indicates and as shown by the legislative history, this exemption was only intended to preserve to labor organizations in the constructoin field the rights which they possessed under *Sand Door* and prior Board and court decisions before enactment of Section 8(e). Patently, before 1959 such agreements could only be obtained *voluntarily* and free from coercion.

In addressing this subject, Senator Kennedy said:

> *"Since the [8(e)] proviso does not relate to Section 8(b)(4), . . .*
> *It is not intended to change the law with respect to the judicial enforcement of these contracts, or with respect to the legality of a strike to obtain such a contract."* II Legislative History of the Labor Management Reporting & Disclosure Act of 1959, 1433 (emphasis added)

Additionally, Representative Barden, Chairman of the House Labor Committee and a member of the Conference Committee, who presented the Conference Report to the House, stated that the first proviso to Section 8(e) would permit the making of *voluntary* agreements relating to contracting and subcontracting of work to be done at a construction site.[31]

Also, specifically preserved were the principles enunciated by this Court in *Denver Building Trades* condemn-

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[31] Congressman Barden stated: "The first proviso under subsection (e) of section 704 permits the making of *voluntary* agreements between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done directly on the site of construction." (emphasis added) II Legislative History of Labor Management Reporting & Disclosure Act of 1959, 1715.

ing secondary boycotts intended to enmesh neutral contractors in disputes not their own.[32]

The principles involved herein were brought into sharp focus by Justice Frankfurter in *Sand Door* wherein he observed:

> ". . . A more important consideration, . . . is the possibility that the contractual provision itself may well not have been the result of choice on the employer's part free from the kind of coercion Congress has condemned. It may have been forced upon him by strikes that, if used to bring about a boycott when the union is engaged in a dispute with some primary employer, would clearly be prohibited by the Act. Thus, to allow the union to invoke the provision to justify conduct that in the absence of such a provision would be a violation of the statute might give it the means to transmit to the moment of boycott, through the contract, the very pressures from which Congress has determined to relieve secondary employers." 357 U. S. 93, 106.

There never has been any expression by this Court since *Sand Door* in a construction industry case, approving the use of any form of coercion to obtain a "hot cargo" provision in a collective bargaining agreement. While the issue in *Sand Door* involved a strike to enforce a "hot cargo" provision, Justice Douglas observed in his dissent that the clause in *Sand Door* ". . . was the product of *bargaining, not of coercion*". 357 U. S. at 112 (see n. 30) (emphasis added).

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[32] Senator Kennedy said: "This proviso affects only section 8(e) and therefore leaves unaffected the law developed under section 8(b)(4). The *Denver Building Trades* (341 U. S. 675) and the *Moore Drydock* (92 N.L.R.B. 547) cases would remain in force." II Legislative History of the Labor-Management Reporting & Disclosure Act of 1959, at 1433.

Since Congress only intended to preserve the *status quo* or take a photograph of the law as it then existed[33] construction unions, therefore, came away with no greater rights than they enjoyed prior to the enactment of the provision to Section 8(e). Yet, the decision below would permit a coercive boycott of secondary employers of unlimited reach, and simultaneously draw to the preferred union and preferred employers, as though by a giant magnet, all of the available work of Connell and other general contractors. Thus, it sanctions a jurisdictional dispute of grand design to the exclusion of other union or nonunion employees. Moreover, the majority decision below confers an extraordinary, exclusive and preferred status upon construction unions enjoyed by no others and clearly goes far beyond any result envisioned by Congress.

The special treatment accorded the construction industry by the proviso to Section 8(e)—authorization to *voluntarily* enter into "hot cargo" agreements is comparable in nature to the special treatment of that industry conferred elsewhere in the amended Act. By the new Section 8(f), Congress likewise gave recognition to the special circumstances pertaining in the industry differentiating it from manufacturing and sales enterprises. Section 8(f) permits construction unions and employers to enter into *voluntary* prehire collective bargaining agreements and to make the union-security provisions of their contracts effective after only 7 days, practices which would otherwise constitute employer violations of Section 8(a) (1), (2), and (3) and union violations of Section 8(b) (1) (A) and (2). As the legislative history makes clear, Congress did

[33] As then Senator Kennedy said: "The first proviso under new section 8(e) of the National Labor Relations Act is *intended to preserve the present state of the law* with respect to picketing at the the site of a construction project and with respect to the validity of agreements relating to the contracting of work to be done at the site of a construction project." (emphasis added) 105 Cong. Rec. 17900, II Legislative History of Labor-Management Reporting & Disclosure Act of 1959 at 1433.

not intend by Section 8(f) to legitimize strikes or picketing to coerce an employer's acceptance of these agreements.[34]

Thus, on what possible basis can the picketing in this case lawfully bring about such a contract with Connell? Is it at all logical to assume that Congress in 1959 would have so carefully drafted Section 8(f), creating unusual new rights and protecting these rights against abuse by prohibiting coercion to obtain them in a primary situation but allow coercion in an admittedly secondary situation to bring about this type of an agreement? There is not one word of legislative history to support such a contention!

The legislative history of the 1959 amendments makes it clear beyond doubt that the status of the law was to be retained. Justice Brennan writing for the majority in *National Woodwork* buttresses this position by observing that "[P]rovisos were added to Section 8(e) to preserve the *status quo* in the construction industry and exempt the garment industry from the prohibitions of Section 8(e).

Consequently, the issue of whether coercive conduct may be utilized in seeking a "hot cargo" clause, is one of novel impression before this Court since the 1959 amendments, and the opportunity here presented enables this Court to cure the Board's error in the reversal of its unanimous decision in *Construction, Production and Maintenance Laborers Local 1383* (*Colson & Stevens*), 137

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[34] H.R. Rep. No. 1147 on S. 1555, 86th Cong., 1st Sess. p. 42, I Leg. Hist. 946 ("Nothing in [8(f)] is intended * * * to authorize the use of force, coercion, strikes or picketing to compel any person to enter into such prehire agreements."); 105 Cong. Rec. 18128, II Leg. Hist. 1715; cf. *Sperry* v. *Plumbers Local 562*, 210 F. Supp. 743 (W. D. Mo. 1962), 52 LRRM 2673, 2676-2677 (holding that Section 8(f) provides no defense to an 8(b)(7)(C) charge); *N.L.R.B.* v. *Int'l Hod Carriers Union, Local 1140*, 285 F. 2d 397, 403 (5th Cir. 1960), cert. denied, 366 U. S. 903.

N.L.R.B. 1650 (1962), *rev'd, Construction, Production and Maintenance Laborers Local 1383* v. *NLRB.*, 323 F. 2d 422 (9th Cir. 1963).

In *Colson & Stevens* the Board extensively reviewed the legislative history of the 1959 amendments and concluded that this history ". . . makes it manifest that Congress did not intend to change existing law with respect to the legality of picketing to obtain and enforce agreements of the type . . ." here involved. 137 N.L.R.B. at 1651. The Board found that proposition implicit in this Court's *Sand Door* opinion. Then, quoting Senator Kennedy's statement that the Section 8(e) proviso was not intended to change the law with respect to the judicial enforcement of contracts, excepted by the proviso or *with respect to the legality of a strike to obtain such a contract,* the Board reached the necessary conclusion that the picketing of Colson violated Sections 8(b)(4)(A) and (B) of the Act.

The decision of the unanimous five-member Board in *Colson & Stevens* convincingly stated:

> "This reading, we believe, gives hospitable scope to the competing interests which Congress here sought to balance. To construe the statute as condemning coercive enforcement of agreements of the type here involved but condoning coercion as a means of obtaining such agreements would in our view be to pay observance to slavish literalism and to frustrate the congressional objective. The Supreme Court periodically reminds us of the familiar principle of statutory construction that words used in a statute should not be literally construed, even where their literary purport is clear, *if such construction would lead to absurd and incongruous results plainly at variance with the policies of the legislation as a whole. United States* v. *American Trucking Association,* 310 U. S. 534, 542-543; *Ozawa* v. *United States,* 260 U. S. 178, 194." 137 N.L.R.B. at 1652, n. 7 (emphasis added).

As can be seen from that finding, once the proviso to Section 8(e) cannot be used to defend against clear secondary conduct, an 8(b)(4)(A) and (B) violation must follow!

Regrettably, even though *Colson & Stevens* represented the unanimous expression of the full five-member Board and was followed by the Board in many cases,[35] the Board later succumbed to errant reasoning and reversed its original well-reasoned and well-founded opinion.[36] Now that very question is before this Court.

Consequently, the Board's reversal of *Colson & Stevens* and other ill-founded court decisions stand in conflict with *Sand Door*, the legislative history of the 1959 amendments and other significant precedents prior to 1959. These decisions do not comport with either *Sand Door* or *National Woodwork* nor are they consistent with the purposes of the proviso to Section 8(e) or Section 8(f).

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[35] Cases in which the Board followed its *Colson & Stevens* doctrine include: *Local 825, Operating Engineers (Building Contractors Association of New Jersey)*, 145 N.L.R.B. 952 (1964); *Local 300 Hod Carriers Union (Fiesta Pools Inc.)*, 145 N.L.R.B. 911 (1964); *Los Angeles Building Trades Council (Treasure Homes)*, 145 N.L.R.B. 279 (1963); *Southern Calif. District of Laborers (Swimming Pool Gunnite Contractors)*, 144 N.L.R.B. 978 (1963); *Los Angeles Building and Construction Trades Council (Stockton Plumbing Co.)*, 144 N.L.R.B. 49 (1963); *Essex County and Vicinity District Council of Carpenters*, 141 N.L.R.B. 858 (1963); *Los Angeles Building & Construction Trades Council (Interstate Employers, Inc.)*, 140 N.L.R.B. 1249 (1963); *Operating Engineers Union (Sherwood Construction Co.)*, 140 N.L.R.B. 1175 (1963); *Building and Construction Trades Council of Orange County (Sullivan Electric Company)*, 140 N.L.R.B. 946 (1963); *Local Union 825 Operating Engineers (Nichols Electric Company)*, 140 N.L.R.B. 458 (1963); *Building and Construction Trades Council of San Bernadino, Etc. (Gordon Fields)*, 139 N.L.R.B. 236 (1962); *Local 60 United Association of the Plumbing Pipefitting Industry (Binnings Construction Co., Inc.)*, 183 N.L.R.B. 1382 (1962).

[36] *Northeastern Indiana Bldg. & Constr. Trades Council (Centlivre Village Apartments)*, 148 N.L.R.B. 854 (1964).

The factual setting in *Connell* represents a completely novel approach to collective bargaining. As *amici* have urged above, the union scheme and restrictive agreement here involved clearly run counter to the entire fabric of the Act. It fosters rather than eliminates industrial strife and does so in a manner completely at odds with the rights of the public in violation of our labor and antitrust statutes.

Never has a case reached this Court that involves such a frontal attack on the basic fundamental concepts that underlie the legislative purposes of the Act. Combined with all of its frightening antitrust implications, this case probably ranks high on the list as one of the most important antitrust cases since the passage of Taft-Hartley.

While certain "hot cargo" agreements are permitted by the proviso to Section 8(e), because of their broad secondary boycott ramifications, Congress has very cautiously acceded to such *voluntary arrangements free from coercion*. Thus, our national labor policy has been balanced against the serious effects of secondary activity with restrictive competitive effects and this is the result. Construction unions have been given wide berth—wider than any other industry in the country except the apparel and clothing industry. However, this special privilege should not be abused.

Common situs bills have been perennially rejected by Congress. *Denver Building Trades* still has vitality. *Sand Door, General Electric, Moore Drydock, Boy's Market* and so many other valid decisions of this Court regulate activity in this industry and teach us that collective bargaining should not be allowed which foists upon the public the unnecessary and unlawful disruptions of commerce as herein involved. In sum, this new statagem must be labeled for what it is—a clear secondary boycott of wide scope with unlimited antitrust implications.

The distortions and confusion that conflicting errant far-reaching decisions in this field have spawned cry out for correction by this Court in order to restore a clear picture of the guideposts and pathways to legitimate objectives for both labor and management in the nation's largest industry.

CONCLUSION

For all of the foregoing reasons and based upon the record as a whole, the Court is respectfully urged to find the conduct herein violative of the National Labor Relations Act, the Sherman Act and the Texas antitrust statute.

Respectfully submitted,

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